1992

Salt Lake City v. Paul Woolley : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS

FOR THE STATE OF UTAH

SALT LAKE CITY, a
Municipal Corporation,

Plaintiff/Appellee, Case No. 920477

v. Priority 2

PAUL WOOLLEY,

Defendant/Appellant.

BRIEF OF APPELLEE

Appeal from a Judgment and conviction of Battery in violation of Salt Lake City Ordinance 11.08.020, a Class B misdemeanor, in the Third Circuit Court of Salt Lake County, Salt Lake Department, Honorable Michael L. Hutchings, presiding.

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Statement of Jurisdiction

Jurisdiction for this case is conferred upon the Court of Appeals pursuant to Utah Code Ann. Section 78-2a-3(2)(d) (1953, as amended).

Statement of Issues

I. Whether statements made by the prosecutor in opening statement amounted to prosecutorial misconduct. The test for determining whether a case should be reversed is if the remarks of counsel call attention of the jurors to matters which they should not consider and whether the jurors were influenced by the remarks or the defendant was prejudiced. State v. Valdez, 513 P.2d 422, 426 (Utah 1973).

II. Whether the evidence presented at trial was sufficient to convict the defendant of battery. The standard of review is set out in State v. Petree, 659 P.2d 443 (Utah 1983), where the review of the evidence is in the light most favorable to the jury verdict and reversing only when the evidence is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime". Petree, 659 P.2d at 444.

Determinative Provisions or Statutes

The determinative statute for this case is Section 11.08.020 of the Salt Lake City Code, which statute is set out fully in the Addendum attached hereto.

Statement of Case

Defendant/Appellant Paul Woolley (hereinafter referred to as defendant) was charged by way of Information with Battery, a Class B misdemeanor, which occurred on February 3, 1992, in Salt Lake City, Utah. The case was tried before a jury on June 22, 1992, with the Honorable Michael L. Hutchings presiding. The jury found defendant guilty of the offense and he was sentenced.

Statement of Facts

Appellee concurs with defendant's Statement of Facts with the following additions.

During the opening statement at trial, counsel for appellee introduced herself, stating that she was an assistant City Prosecutor for Salt Lake City and that she represented the government. She continued, stating "Somewhere along the line today

I want you to stop and think about what government means to you. Particularly in a case like this. The government represents you, it represents". At that point an objection was made, leaving the sentence uncompleted. The objection was sustained and counsel continued with "I work for Salt Lake City. Because I represent Salt Lake City I have no one to sit next to me at counsel table. That is why I will be alone at counsel table and you need to realize that that's my job here today" (T. 3).

During defense counsel's opening statement, she admonished the jury to keep in mind that "the only evidence you need to consider is evidence that comes from people that sit in that witness chair or evidence that the judge enters in such as documents or things of that nature. What I or what Ms. Atkin say to you is not testimony" (T. 5).

Sammy Knighton, the witness who was with the victim at the time of the incident, stated that the victim was hit and knocked down, receiving a bruise (T. 8). He further described it as a hit in the jaw with a fist, causing the jaw to become swollen (T. 9, 10, 33). He said the person came from behind them but that he could not remember to which side of him the victim was (T. p. 10, 12, 33). On cross-examination, the witness stated that the victim was on his left side, but that the incident happened fast and he could not remember everything (T. 12, 13). However, Mr. Knighton positively identified the defendant as the person who hit the victim (T. 9, 10, 31).

Albert Ortega, the step-brother of the victim, told the jury that his step sister is handicapped with a "slow mental disability", for which she receives training at the Columbus Community Center (T. 14). This witness did not see the incident but ran from the house and saw defendant (T. 15). Mr. Ortega also positively identified defendant (T. 16).

Juanita Valdez, the victim, testified that she was hit in the jaw by the defendant (T. 21, 22).

At the close of trial, the Judge instructed the jury extensively, telling them to only base their considerations on evidence from witnesses or exhibits or inferences drawn from proven facts. The jury was instructed to not consider statements of counsel as evidence (R. 20; Instruction No. 6 set out fully in Addendum). In addition, an instruction was given listing the factors the jury could consider in determining credibility of the witnesses, which included their demeanor, their capacity to perceive, recollect and communicate, their opportunity to perceive, etc. (R. 28-29; Instruction No. 14 set out fully in Addendum). The jury was also instructed to not base any verdict on mere possibility, surmise or speculation (R. 31; Instruction No. 16 set out fully in Addendum).

Summary of Argument

The remarks of the prosecutor in opening argument at trial of this case did not amount to prosecutorial misconduct as they did not call the attention of the jurors to evidence they should not consider nor did they prejudice defendant's case. The remarks were

immediately objected to by defense counsel and Instructions given by the Court mitigated any error that might have occurred.

There was sufficient evidence to convict the defendant of battery through the testimony of the witnesses, even though portions of their testimony were inconsistent. The jury was in the best position to judge the credibility of the witnesses and their determination resulted in defendant's conviction.

Argument

POINT I.

STATEMENTS MADE BY THE PROSECUTOR IN OPENING STATEMENT DID NOT AMOUNT TO PROSECUTORIAL MISCONDUCT.

The opening statements in a jury trial are an important method of providing the jury with an overview of the case and the people involved in the trial. The statements begin to guide the jury through the entire trial process so they will more fully understand their part and their ultimate responsibility.

The Utah courts have adopted a two-prong standard for prosecutorial misconduct. For a case to be reversed, the remarks must "call to the attention of the jurors matters which they would not be justified in considering in determining their verdict and were they, under the circumstances of the particular case, probably influenced by those remarks". State v. Valdez, 513 P.2d 422, 426 (Utah 1973). This test has been extensively applied in subsequent cases.

In the case of State v. Troy, 688 P.2d 483 (Utah 1984), the Supreme Court applied the Valdez test after the prosecutor told a jury that defendant was using an alias, was in a federal witness

program, that he had been involved in "various criminal matters" and compared him to known criminals with irrational behavior. The Court found that both prongs of the test were met and defendant's conviction was reversed. Troy, 688 P.2d at 486, 487.

The Court of Appeals affirmed a conviction under the two-prong test in State v. Ortiz, 782 P.2d 959 (Utah App. 1989), after a prosecutor referred to a defendant's previous felony convictions. Counsel for defendant originally elicited the testimony on direct examination of the defendant. The prosecutor then cross-examined on the issue and used it in closing argument. This Court found that any possible prejudice caused by the comments were mitigated by a court instruction stating that prior convictions could be used only in weighing credibility and that any prejudicial error was harmless. Ortiz, 782 P.2d at 962.

In the case of State v. Hopkins, 782 P.2d 475 (Utah 1989), the prosecutor in closing argument commented on lack of consent of the victim in the aggravated sexual assault case, incorrectly stating the law that was provided to the jury in an instruction. In addition, he stated that he was impressed by the evidence in the case. The Court relied on reasoning in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038 (1985):

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carried with it the imprimatur of the Government and may induce the jury to trust the Government's

> judgment rather than its own view of the evidence. Young, 470 U.S. at 18-19.

That Court continued:

> (A) criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. Young, 470 U.S. at 7.

However, the Utah Supreme Court found the prosecutor's comments to be harmless based on other comments made during the course of trial, thereby affirming defendant's conviction. Hopkins, 782 P.2d at 480.

In reviewing a prosecutor's misstatement of the law to the jury on a crucial defense issue in State v. Lopez, 789 P.2d 39 (Utah App. 1990), this Court found that the attention of the jurors was drawn to something they should not have considered. However, because defense counsel immediately objected to the comment and in detail corrected the error in her closing argument, the Court found the prosecutor's remarks were not reversible error. Lopez, 789 P.2d at 45. The Court continued to evaluate the effect of the remark on the jury and considered the strength of the evidence, pointing out that there was "overwhelming" evidence of defendant's guilt balanced against defendant's "improbable, contradictory, and self-serving accounts of his actions". The Court found that the jury "simply chose not to believe defendant's theory" and held the prosecutor's remarks were not prejudicial. Lopez, 789 P.2d at 46.

In a recent case, State v. Emmett, 839 P.2d 781 (Utah 1992), the Supreme Court again used the two-prong test when a prosecutor

referred to defendant's previous convictions for forgery in closing argument. Although defense counsel did not object, the Court found the remarks were plain error in that they impacted the defendant's credibility and character, "which were at the heart of his defense". The Court concluded it was a significant error and warranted a new trial. Emmett, 839 P.2d at 786.

Another recent case, State v. Brown, 201 Utah Adv. Rep. 4 (Utah 1992), discusses prosecutor misconduct where a prosecutor stated, "There isn't one of us here who knows how we would react in a situation like that with four mad dogs out there beating on someone." Brown, 201 Utah Adv. Rep. at 9. The Court stated that "mad dog" is a personal invective which reflected a lack of detachment and should not be part of a prosecutor's rhetoric. The Court explained:

> Prosecutors engage in misconduct, however, when they assert personal knowledge of the facts in issue or express personal opinion in the form of unsworn testimony that tends to "exploit the influence of the prosecutor's office and undermine the objective detachment that should separate a lawyer from the cause being argued. Brown, 201 Utah Adv. Rep. at 9; citations omitted.

The prosecutor's remarks in this case were simply to assist the jury in understanding the role of the prosecutor in the trial process. When the government is a party in a lawsuit, jurors need to understand the role the government is taking in that lawsuit and that the prosecutor is acting on behalf of the people and society in general. The jurors were asked to reflect on what government meant to them but such reflection could elicit adverse attitudes as well as favorable ones. Defense counsel's objection was immediate,

cutting off the remainder of the prosecutor's sentence. As a result, the jury probably did not comprehend what the prosecutor was attempting to convey.

In her opening statement, defense counsel cautioned the jury to only consider evidence from the witness stand or physical evidence admitted by the Court (T. 5). The Court also instructed the jury that they were only to consider the evidence of the witnesses and that they could not base their verdict on speculation, surmise or possibility (R. 20, 31), thus mitigating any possible effect the comments may have had on the jury. There was no reasonable likelihood that the error affected the outcome of the case, rendering it harmless error. State v. Verde, 770 P.2d 116, 120 (Utah 1989).

In reviewing the cases of prosecutor misconduct that have resulted in reversals of convictions, the misconduct was egregious. In this case the prosecutor did not call attention to prior convictions of defendant, did not misstate the law, did not comment on the strength of the evidence or refer to defendant as a "mad dog". Additional evidence was not brought into the trial to support the charges and the remarks did not indicate any trustworthiness of the City's case. At no time was the influence of the prosecutor's office exploited nor was defendant's credibility or character undermined. The two-prong test set forth in State v. Valdez, 513 P.2d at 426, has not been met in this case. The jurors' attention was not called to something they should not have considered and their decision was not influenced by the

remark. If any error was made, it was harmless and did not result in any prejudice to defendant as it was properly mitigated by defense counsel and the Court in its instructions. The jury judged the credibility of the witnesses, including defendant, and found him guilty of Battery. His conviction did not result from prejudice but from the evidence presented and relied upon by the jury.

POINT II.

THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF BATTERY.

The offense of Battery under Salt Lake City Code, Section 11.08.020, as set out in the Addendum attached hereto, includes willful and unlawful use of force or violence upon the person of another. Although they were mentally handicapped and could not remember all details and were inconsistent on some of the details, the two witnesses for the prosecution, Mr. Knighton and Ms. Valdez, were certain that Ms. Valdez was hit by the defendant. The hit knocked her to the ground, causing bruising and swelling in the jaw area. In addition, Mr. Ortega confirmed that the defendant was in the area.

The Utah Courts have addressed the issue of sufficiency of the evidence on numerous occasions holding:

> In reviewing a jury verdict to determine whether it was based on sufficient evidence, we view the evidence presented and all inferences to be drawn therefrom in a light most favorable to the verdict. (Citations omitted) The jury, not the appellate court, should weigh the evidence and assess witness credibility. State v. Booker, 709 P.2d 342, 345 (Utah 1985). Thus, we will sustain the jury's verdict where there is any evidence or reasonable inferences that can be drawn from the evidence

> from which the jury could make findings of all the elements of the crime beyond a reasonable doubt. State v. Brown, 201 Utah Adv. Rep. 4, 9 (Utah 1992). See also State v. Petree, 659 P.2d 443 (Utah 1983).

The Utah Supreme Court continued:

> It lies within the province of the jury to determine the facts, and this Court does not have the prerogative to substitute its judgment on the credibility of witnesses for that of the fact-finder. When faced with a challenge to the sufficiency of the evidence, the Court, then, must review the evidence in the light most favorable to the jury verdict and will overturn the verdict only when the evidence is so lacking or insubstantial that a reasonable person could not have reached that verdict beyond a reasonable doubt. State v. Hopkins, 782 P.2d 475, 477 (Utah 1989).

In the case of State v. Vigil, 840 P.2d 788 (Utah App. 1992) there was extensive inconsistent testimony among seven girls who had been supplied alcohol by defendant at his home. Some of the girls said defendant was at the home all night, others said he was not there for part of the evening. Some of the girls were offered beer by defendant, others took the beer from the refrigerator without objection by defendant. All but one of the girls signed a statement recanting their testimony to the police and their testimony at the preliminary hearing. The jury found the defendant guilty and the verdict was upheld despite the contradictory and inconsistent testimony. Vigil, 840 P.2d at 793.

In the case presently before the Court, there was inconsistent testimony from the witnesses as to which side of Mr. Knighton Ms. Valdez was on and which side of her face was hit. The jury witnessed the mental handicaps of the witnesses and judged their credibility. This Court should not substitute its judgment for that of the jury particularly in this case because of the handicaps

of the witnesses. They were "slow" but were functioning adults and capable of knowing the basic facts of what occurred. The jury was instructed on factors to consider in judging credibility (R. 28-29) and they made a determination of that credibility. The jury found the important facts beyond a reasonable doubt: that defendant hit the victim. There was sufficient credible evidence to support the conviction of defendant. The evidence was not so lacking or insubstantial that it was unreasonable for the jury to reach its verdict. The jury simply believed the prosecution witnesses and rejected the testimony of defendant.

CONCLUSION

The remarks of the prosecutor in this case did not amount to prosecutorial misconduct or were minimal, harmless error. Sufficient evidence is provided in the record to uphold defendant's conviction of Battery. Appellee respectfully requests that this Court affirm the decision of the jury.

Dated this 29th day of January, 1993.

Marsha S. Atkin

Marsha S. Atkin
Assistant City Prosecutor

CERTIFICATE OF DELIVERY

I hereby certify that I delivered four true and correct copies of the foregoing Brief of Appellee to Mr. Carlos A. Esqueda, Salt

Lake Legal Defender's Association, 424 East 500 South, #300, Salt Lake City, Utah 84111, this 29th day of January, 1993.

Marsha S. Atkin

ADDENDUM

11.08.050 Place of commission of offense involving use of telephone.

11.08.010 Assault.

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. It is unlawful for any person to commit an assault within the limits of Salt Lake City. (Prior code § 32-1-2)

11.08.020 Battery.

A battery is any wilful and unlawful use of force or violence upon the person of another. It is unlawful for any person to commit a battery within the limits of the city. (Prior code § 32-1-3)

11.08.030 Telephone harassment.

A. A person is guilty of telephone harassment if, with intent to annoy or alarm another, he/she:

1. Makes a telephone call, whether or not a conversation ensues, without purpose of lawful communication, including but not limited to making a call or calls and then terminating the call before conversation ensues; or

2. Makes repeated, unwanted telephone calls at extremely inconvenient hours; or

3. Insults, taunts or challenges another by use of telephone communication in a manner likely to provoke a violent or disorderly response; or

4. Telephones another and knowingly makes any false statement concerning injury, death, disfigurement, indecent conduct or criminal conduct of the person telephoned or any member of his/her family, or uses obscene, profane or threatening language with intent to terrify, intimidate, harass or annoy. The making of a false statement as herein set out shall be prima facie evidence of intent to terrify, intimidate, harass or annoy.

B. Telephone harassment is a Class B misdemeanor. (Ord. 88-86 § 60 (part), 1986: prior code § 32-1-19)

11.08.040 Emergency telephone abuse.

A. A person is guilty of emergency telephone abuse if such person:

1. Intentionally refuses to yield or surrender the use of a party line or a public pay telephone to another person upon being informed that such telephone is needed to report a fire or summon police, medical or other aid in case of emergency, unless such telephone is likewise being used for an emergency call; or

2. Asks for or requests the use of a party line or a public pay telephone on the pretext that an emergency exists, knowing that no emergency exists.

B. Emergency telephone abuse is a Class B misdemeanor.

C. For the purposes of subsection A of this section:

1. "Emergency" means a situation in which property or human life is in jeopardy and the prompt summoning of aid is essential to the preservation of human life or property;

2. "Party line" means a subscriber's line or telephone circuit consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number. (Ord. 88-86 § 60 (part), 1986: prior code § 32-1-20)

11.08.050 Place of commission of offense involving use of telephone.

Any offense committed by use of a telephone as set out in Sections 11.08.030 and 11.08.040, or their successors, may be deemed to have been committed at either the place at which the telephone call or calls were made, or at the place where the telephone call or calls were received. (Ord. 88-86 § 60 (part), 1986: prior code § 32-1-22)

Chapter 11.12

OFFENSES AGAINST PUBLIC ORDER

Sections:

11.12.010 Riot.

INSTRUCTION NO. 6

As jurors, it is your exclusive responsibility to determine the issues of fact in this case and you are to decide those issues from the evidence received in the trial and not from speculation or conjecture.

The evidence to be considered by you includes the testimony of witnesses, exhibits received by the court, stipulations of the parties, reasonable inferences to be drawn from facts proven in the case, presumptions, if any, as are stated in these instructions, and all of the facts and circumstances disclosed thereby. Statements of counsel are not evidence and should not be considered as such by you.

If and where there is a conflict in the evidence, you should reconcile such conflict as far as you reasonably can; but where the conflict cannot be reconciled then, since you are the final judges of the facts and the credibility of the witnesses, you must resolve that conflict and determine from the evidence what you believe the true facts to be.

INSTRUCTION NO. 14

Every person who testifies under oath is a witness. You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case. In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his/her testimony, including but not limited to the following:

His/her demeanor while testifying and the manner in which he/she testified;

The character of his/her testimony;

The extent of his/her capacity to perceive, to recollect, or to communicate any matter about which he/she testifies;

The extent of his/her opportunity to perceive any matter about which he/she testifies;

His/her character for honesty or veracity or their opposites;

The existence of honesty or veracity or their opposites;

The existence or nonexistence of a bias, interest, or other motive;

A statement previously made by him/her that is consistent with his/her testimony;

A statement made by him/her that is inconsistent with any part of his/her testimony;

The existence or nonexistence of any fact testified to by him/her;

His/her attitude toward the action in which he/she testifies or toward the giving of testimony; or

His/her admission of untruthfulness.

His/her prior conviction of a felony.

INSTRUCTION NO. 16

You cannot convict the defendant on mere possibilities, surmises, or speculations, however strong they may be. A verdict of guilty based upon mere possibilities or surmises would violate the oath that you jurors have taken. Nor does the law permit you to guess or speculate as to the activities of the defendant.